Daniel Construction Company, a Division of Daniel International Corporation *and* North Carolina State Building & Construction Trades Council, AFL–CIO. Case 11–CA–10271

May 2, 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On November 30, 1982, Administrative Law Judge Richard A. Scully issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

RICHARD A. SCULLY, Administrative Law Judge: Based upon a charge filed on January 22, 1982, by North Carolina State Building & Construction Trades Council, AFL–CIO (the Union), the Acting Regional Director for Region 11 of the National Labor Relations Board (the Board) issued a complaint on February 26, 1982, alleging that Daniel Construction Company, a Division of Daniel International Corporation (the Respondent), had committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act). Specifically, the complaint alleges that the Respondent violated the Act by refusing to hire Willie Millard because of his union affiliation and activity. The Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held at Durham, North Carolina, on August 18, 1982, at which the parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. Upon the entire record and from my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was a corporation with its principal office in Greenville, South Carolina, engaged in construction work at several sites outside South Carolina, including construction of the Shearon Harris Nuclear Power Plant at New Hill, North Carolina. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Willie Millard has been a union member continuously since 1966. He filed an application seeking work as a millwright with the Respondent at its Shearon Harris construction site on May 27, 1981.[1] Millard was not hired at that time and thereafter he made periodic calls to the Respondent's personnel office and was told they were not hiring. Millard arranged, through a relative who was working at the Shearon Harris project, a meeting with Millwright Superintendent Buddy George outside the personnel office at the jobsite on August 4. Millard met with George, whom he had worked with on a job about 10 years before. They discussed the jobs they had been working on in the interim as well as the Shearon Harris job. George asked some questions of Millard, stated that he needed some good help, and ultimately told Millard he would like to hire him. George stated that he did not have the authority to hire but that he would recommend Millard to personnel. George entered the personnel office and a short time later came out of the office accompanied by personnel clerk Kelvin Donegan. Up to that point the testimony of Millard and George is in agreement. What happened next is a matter of some dispute.

According to Millard, George returned from the personnel office with Donegan who waved Millard's application and said: "Well, you've got the job." Millard turned to George and asked if he was kidding and George said, "No," and told Millard to report on Monday morning. Donegan told Millard that he was required to wear shoes over his ankles and to have his blood pressure right. Millard offered to go to first aid right then to have his blood pressure checked, but was told to wait until Monday morning when he could "go by with the rest of them." Millard left believing that he

[1] Hereinafter all dates are in 1981.

had been hired and immediately went out and spent nearly $300 on a set of new tires for his camper which he planned to drive to and live in near the jobsite.

George testified that he went into the personnel office and told Donegan he had a man he wanted to give a job and asked Donegan to come out and talk to Millard. Donegan went outside and told Millard that he did not see any problem and that he would turn it over to personnel for verification. Millard asked if he could start work on Monday if everything checked out and George said that would be fine. Millard asked if he could take a physical then and offered to go to his doctor for a checkup. Donegan told Millard that this was not necessary, that he could take the physical once he was hired, that it would be on company time, and that he would be paid for it. Before leaving, Millard mentioned that he was going to buy new tires for his camper. George had no recollection of Donegan telling Millard "you've got the job" or Millard asking him if Donegan was "kidding." According to George, Millard was not definitely told he had a job on August 4, but rather that if everything checked out okay he was to come in and start orientation on Monday, August 10.

Donegan testified that, when George asked him to talk to Millard, he told Millard that his application looked "okay to me" and that he "would have to run it through Personnel for approval." Millard mentioned taking a physical and Donegan told him physicals were done on the job the day one started work. Donegan denied telling Millard he had "got the job" or in any way indicating to him that he had been hired.

On August 6, Millard received a telephone call from the Respondent's assistant personnel manager, James Perry, who told him he did not have a job and that there were no openings in the millwright craft at that time. Perry told Millard that his application looked fine, that it would be kept on file, and that he would be considered for employment when there was an opening. Millard has never been offered a job by the Respondent at the Shearon Harris project.

The General Counsel contends that Millard was hired on August 4, that there were openings in the millwright craft on that date, and that the job was withdrawn only after the Respondent became aware of Millard's union affiliation and prior union activity. The Respondent contends that Millard was not hired on August 4, that there were no openings in the millwright craft on that date, that this was the reason Millard was not given a job, and that it was unaware of Millard's union background and it was not a factor in its decision not to employ Millard. There is no dispute but that the Union was attempting to organize the Shearon Harris project at the time of Millard's application for employment.

Analysis and Conclusions

Whether or not Millard was, in fact, hired on August 4 is significant because if he was it would cast considerable doubt on the Respondent's claim that Millard could not be hired because there were no openings in the millwright craft. While I believe that Millard attempted to testify truthfully, I found his recollection to be suspect in some respects, such as when he had applied for work at the Shearon Harris project and the date of his past employment with the Respondent. On the other hand, George and Donegan were forthright in their testimony and appeared to have a better recollection of what occurred on August 4. Also, the other facts in the record and the inherent probabilities support their version. Although George testified that there was a time when he worked for the Respondent that supervisors could hire men at the project gate, it is clear that he had no such authority to hire at the Shearon Harris project and he told this to Millard. Likewise, Donegan had no authority to hire anyone. Even after George had recommended that a person be hired, as he did with Millard, hiring was subject to approval by the construction manager and the personnel office after it had verified the applicant's work record. There appears to be no doubt but that George thought there was an opening in the millwright craft and that Millard, whom he considered a good, qualified worker, would be hired, and that he conveyed this impression to Millard who left the jobsite on August 4 feeling confident he was going to work on Monday, August 10. On August 4, however, Millard did not fill out any of the tax, insurance, or other papers normally associated with starting a new job, did not take a physical which is given on company time the first day of work, and did not receive any orientation.

The Respondent's project construction manager, Byrd Isom, testified some and without contradiction that on the Shearon Harris project, which is being built for Carolina Power and Light (CP&L), a public utility, unlike some other projects there are certain fiscal restraints which control the manpower levels on the job at any given time. Consequently, total authorized manpower is allocated among the various crafts depending on the critical path on the job. Craft manpower levels are adjusted periodically as needed. Even when a particular craft is under its maximum authorized strength, before a new or replacement craftsman can be hired, the craft superintendent must submit a personnel requisition which Isom must sign off on and the personnel office must verify the applicant's work record since the Respondent's contract with CP&L requires it to assure that all of the craftsmen employed on the project are fully qualified. As of the time Millard left the project on August 4, no personnel requisition had been approved and his work record had not been checked. I find that Millard had not been hired by the Respondent on August 4.[2]

Construction Manager Isom testified that Millard's situation was brought to his attention by Perry, who told him that George wanted to hire Millard, but that there was no signed requisition approving the hire. Isom told Perry that the millwright craft was "on hold" and that no additional millwrights were to be hired. As of August 4, the maximum number of positions allocated to the

[2] Although Millard testified that he had worked for the Respondent on several projects and that 90 percent of the time he had been hired by the foreman at the gate, his most recent experience with the Respondent was not less than 7 years earlier. I credit the consistent testimony of the Respondent's witnesses and its documentary evidence that, on the Shearon Harris project, foremen had no authority to hire at the gate and that all hiring was done through the personnel office in accordance with the outlined procedures.

millwright craft was 38. However, on that date only 37 millwrights were actually employed and Isom was holding at that number.[3] While a particular craft could not normally exceed its maximum authorized strength, there were times when a craft that was not at full strength was put "on hold" and the allocation to another craft was increased if he deemed it necessary. On August 4, he was holding in the millwright and several other crafts so that he could put more electricians on the job.

James Perry testified that when Donegan informed him that George wanted to hire Millard he understood that there were no openings for millwrights available. George advised him that he had previously filed a request for additional millwrights and Perry went to Isom to see if the request had been approved. Isom told Perry that there were no openings for millwrights at the time, that there were greater needs elsewhere, and that they were near the manpower limit for the entire project. Perry told George about this and called Millard to inform him that he would not be hired. Perry also testified that he was familiar with the authorized manpower levels and that he knew that there was a hold on hiring in the millwright craft at the time.

The record contains a memorandum dated September 18 prepared by the project personnel manager, Bill Burns, which states that "on August 1, millwright manpower was increased from 38 to 42 thus creating 4 openings." The General Counsel argues that this proves that there were, in fact, openings available for millwrights on the day Millard spoke with George and George recommended his hire and that the Respondent's stated reason for not hiring Millard, that there were no openings, is a pretext.

Burns testified that, while Perry told him about the nonhiring of Millard when it happened, he had no direct involvement in the matter. He prepared the memorandum after the fact in response to a request from his boss who wanted to know what had happened. Burns said he prepared the memorandum after talking with Donegan, looking at Millard's application, and talking by telephone with Perry who by then was working in Mississippi. He said that the statement in the memorandum that the millwright manpower was increased from 38 to 42 on August 4 was based on information he received on the telephone from Perry. According to Burns, the date on which manpower was increased can be ascertained by looking at the approved personnel requisition form.

The record contains a requisition form initiated by George on July 27 seeking 9 additional millwrights. An increase to a total of 42 millwrights, 5 more than were actually on the job, was approved and signed off on by Isom on August 12. I consider this requisition form, which Isom identified and testified he signed and dated on August 12, to be a more reliable indicator of when the millwright manpower level was increased than Burns' memorandum, which is inaccurate in other respects, such as the date that George recommended Millard for hire and the suggestion that it was George that contacted Millard about a job. I find that there is no credible evidence contradicting the testimony of Isom that, when Millard was not hired by the Respondent following George's recommendation that it do so, there were no millwright openings available and Isom declined to raise the limit for the millwright craft.[4]

Having found that the Respondent's proffered reason for failing to hire Millard was not a pretext, it must be determined whether protected conduct was a motivating factor in the Respondent's decision not to hire Millard.[5] The General Counsel contends that it was and points to a case[6] in which the Respondent was found to have committed violations of Section 8(a)(1) and (3) of the Act by discharging employees because they engaged in protected activity and by refusing to hire applicants for employment because of such activity. He argues that the Respondent in the instant case has continued the practice of denying employment because of union affiliation and says that Bill Burns, who was found to have given instructions to a supervisor to screen out applicants with union backgrounds in the former case, "played a critical role in the events surrounding the instant case." I find what occurred in the prior case does little more than raise some suspicion about the events in the instant case. The events in the prior case are remote in terms of both time and place having occurred approximately 5 years before at a construction project in South Carolina. While Burns had a direct role in the violation found in the prior case, he had no direct involvement in the events in this case other than having been informed of what was going on at the time by Perry and compiling a cursory and largely inaccurate account of what happened more than a month after the fact. Not only is there no evidence of Burns giving instructions to anyone to screen out applicants with union backgrounds at the Shearon Harris project, but the actions and credible testimony of Buddy George indicate that none were given to him. Apart from its previous violations of the Act, there is no evidence of any union animus on the part of the Respondent in the record of this case.

There is little to suggest that the individuals who were involved with Millard's application for employment at the Shearon Harris project were aware of his union membership or activities. The General Counsel contends that the Respondent was aware that Millard had previously worked for union-organized construction compa-

[3] The General Counsel questions Isom's credibility, stating in his brief (p. 7): "When confronted on cross-examination with the fact that Respondent had one position available under its existing manpower limit of 38 millwrights, Isom stated that he had placed a 'hold' on that position as well." It is noted that it was Isom who on direct examination voluntarily disclosed the fact that there were only 37 millwrights on the job on August 4. He went on to state on direct examination that he had been holding at that number.

[4] There is no merit to the General Counsel's argument that Isom gave George a "different reason" for Millard's not being hired. George clearly testified that Isom told him that Millard could not be hired because there was no opening for another millwright at the time. Isom did talk with George, who was relatively new to the Shearon Harris project, about the procedures that had to be followed in hiring employees, but there is no indication in the testimony of either that Isom told George that Millard was rejected for employment for any reason other than the fact that there was no opening in the millwright craft. Nor do I consider it significant that George was unaware that Isom had placed a temporary hold on hiring in his craft since he had not previously sought to hire anyone in the 6 weeks he had been on the job.

[5] See *Wright Line*, 251 NLRB 1083, 1089 (1980).

[6] *Daniel Construction Co.*, 244 NLRB 704 (1979).

nies because they were listed on his application for employment. However, the only representative of the Respondent known to have discussed Millard's work history with him, Buddy George, was not shown to have any knowledge that Millard's previous employers were union organized and, in any event, it was George who attempted to get Millard hired. There is no evidence that the Respondent made any attempt to check on Millard's work history after George recommended him for hiring since it was determined almost immediately that there was no openings available.[7]

Millard testified that he had previously worked for the Respondent as a millwright at several different construction projects. At some time during the early 1970's (he was unable to recollect the date with any degree of certainty), he participated in an attempt to organize a job involving construction of a plant for Du Pont. According to Millard, he walked the picket line at the project and was seen doing so by supervisors, including the job superintendent. The Respondent offered no evidence to contradict this although it would have been remarkable if it had inasmuch as Millard's testimony was vague at best about when this occurred and he could not identify the supervisors who saw him on the picket line. What I consider more significant is the lack of any evidence that anyone connected with the Respondent who was involved with consideration of Millard's application for employment on August 4 had any knowledge of his picket line activity at the Du Pont project or that such information was readily available to them from the Respondent's files. As discussed above, the most likely source of such information, the Respondent's computerized records on former employees, had no record of Millard, who admittedly last worked for the Respondent before the date its computer records start.

In summary, I find that Millard, who had for a matter of months sought employment with the Respondent at its Shearon Harris project, arranged through a relative employed there to meet with the project's millwright superintendent, George. Such contact appears to have been outside the normal hiring procedure. George, who was new to the project and had not hired anyone up to that point, felt that Millard was qualified for the job, that he had need of qualified help, and that he had a position available, for which he recommended Millard. Although not actually hired on August 4, Millard left the project believing he would start work on August 10 "if everything checked out," meaning if his blood pressure was acceptable and his work history were verified. After George submitted his recommendation that Millard be hired to personnel, it was determined that there were no openings in the millwright craft because the request George had submitted for an increase in the maximum authorized number of millwrights had not been acted on and the project construction manager had placed a hold on hiring in the millwright and other crafts prior to August 4 so that more electricians could be put on the job. This precluded the hiring of a millwright even though there was one less on the job than the maximum number authorized when manpower levels in the various crafts had last been determined. I find no evidence that Millard's union affiliation or prior union activity was considered when the Respondent determined that it had no opening for another millwright on August 4 and no evidence that reasonably supports such an inference.

I find that the General Counsel has failed to establish a *prima facie* case that protected activity had any influence on the Respondent's decision not to hire Millard when George recommended him for hire on August 4. In the event that the Board should disagree with this conclusion and determine that a *prima facie* case has been established, I further find that, upon consideration of all of the evidence in the record, it establishes that the Respondent's defense that it had no opening for a millwright on August 4 was not a pretext and that because there was no opening the Respondent would have taken the same action in rejecting Millard for employment even in the absence of protected conduct.

Insofar as the complaint alleges that the Respondent has violated the Act by failing to hire Millard at any time since August 4, I find that the evidence is insufficient to make any determination as to whether a violation has, in fact, occurred. As noted above, on August 12 a requisition was approved by Isom increasing the maximum number of millwrights to 42, thus creating at least 5 openings in that craft. Millwrights have been hired since that date, but Millard has never been offered employment at the Shearon Harris project. Millard testified that, after being told not to report to work on August 10, he telephoned George on August 6. George told him that he did not know what happened, did not understand it, and was sorry about it. He called George again on August 31. George told him he still did not know why he had been turned down and that other millwrights had been hired.

According to George, Millard called him on two occasions immediately after he was told not to report for work. George told Millard that he did not know what had happened and would try to find out. George did not recall telling Millard that any other millwrights had been hired in these conversations. George testified that he told Millard there were no openings available, and Millard spoke about seeking work elsewhere and mentioned West Virginia. Millard admitted telling George that he might be seeking work in Virginia or West Virginia, but could not remember when he told him this. According to George, Millard called him a third time on August 31 and invited George and his family to visit him at the beach. George did not recall any discussion concerning job openings in this conversation.

Although the General Counsel contends that Millard continued to remind George that he was available for and seeking work when other millwrights were being hired after August 12, I do not find this to be the case. I credit the testimony of George, who impressed me as a truthful witness with better recall than Millard, that after his second conversation with Millard in early August he

[7] The General Counsel mistakenly argues that the Respondent had checked out Millard's work history at the time George recommended him, citing testimony of Bill Burns. Burns simply stated that at some time since the events in question the Respondent had Millard checked out on its computerized records of its own former employees which began to be compiled in April 1975 and found he was "not on file."

thought Millard was seeking work elsewhere and no longer thought about hiring him. Their only contact after that was on August 31 when Millard invited George to the beach.

There is some evidence in the testimony of George and in the memorandum prepared by Burns that, when new millwrights were hired at the Shearon Harris project, they were people who came from other Daniel jobs or were hired as potential supervisors. There is nothing in the record that establishes that Millard was more qualified than the millwrights who were hired after August 12, nor is there anything which would indicate that had it not been for George's intervention Millard would even have been considered for hiring before the individuals that were actually hired. It appears that Millard got as far as he did only because of his initiative in seeking out George with whom he had little more than a passing acquaintance and who took no further action on Millard's behalf once he thought Millard was seeking a job elsewhere. The evidence does not establish why Millard was not hired after August 12. To attribute it to protected activity would be sheer speculation.

I find that the General Counsel has failed to established by a preponderance of the evidence that the Respondent violated Section 8(a)(1) and (3) of the Act by its failure to hire Willie Millard at its Shearon Harris construction project and hereby issue the following recommended:

ORDER[8]

The complaint is dismissed in its entirety.

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.